

PUBLIC DEFENDER NEWS

CHIEF'S CORNER

I have a tendency at times to lapse into a bunker mentality, when it seems as if we are unfairly criticized and no one seems to care about us or our clients. The fallacy of this paradigm was made apparent to me during a public defender leadership conference I attended recently.

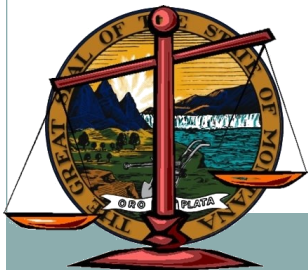
Our situation – underfunded, with an overwhelming caseload – is far from ideal. We are not alone in our distress. Many public defender agencies, on the local, state and federal level, are going through many of the same problems. In fact, budget cuts imposed as part of the sequestration mess are leading to furloughs and job terminations for our federal PD colleagues, and to delays in payments for contract attorneys. Our plight is not so bad, compared to some of our colleagues. We would do well to remember that we are all in this together.

Second, it simply is not true that everyone dislikes us, or that we are the only ones who care. In many communities, individuals, church groups and organizations such as NAMI care about the same groups of people we represent. Again, we are not in this alone. There is strength in numbers.

Solutions to a number of our problems rest in the hands of other entities, but we can't wait for others to shape up and solve all our problems. It is imperative that we be proactive and seek to implement those remedies that are within our power. As many of you know, we filed motions in the Municipal Court and in the Justice Court in Region 4, asking that the courts cease assigning cases for a period of time, as the last viable means of addressing an excessive workload. A hearing is set for October 2 in Helena. Links to the motion, supporting brief and exhibits are on our website, and if you haven't done so, I encourage you to review these papers.

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SPECIAL POINTS OF INTEREST

- Awards!
- New Laws Start October 1
- Information ROT

APPELLATE NEWS



Wade Zolynski,
Chief Appellate Defender

In August, the Montana Supreme Court delivered two favorable opinions in cases handled by the Office of the Appellate Defender.

The first case, *State v. Brothers* 2013 MT 222, was handled by former assistant appellate defender (and current assistant public defender, Region 4) Jonathan King. Noel Larrivee acted as counsel at the district court level. The Court held the State cannot be awarded restitution for the cost of extraditing the defendant from New Mexico to face trial in Montana.

The second case, *State v. Rogers* 2013 MT 221, was handled by assistant appellate defender Eileen Larkin. Chris Daly acted as counsel at the district court level. A

unanimous Court reversed Rogers' convictions due to the prosecutor's cross examination which highlighted his criminal record, including cases that have been reversed on appeal.

Both the appellate level and trial level counsel involved in these cases struggled. Progress was the result. Keep struggling. May the force be with you.



The State is not a victim, and therefore, it cannot be awarded restitution for the cost of extraditing the defendant. *State v. Brothers* 2013 MT 222.

The State charged Brothers with sexual assault, incest, and indecent exposure on September 1, 2010.

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“Progress flows only from struggle.” - Louis D. Brandeis

REGION 11 WELCOMES TWO NEW EMPLOYEES!

The Miles City office was pleased to have Assistant Public Defender Joseph Zavatsky join OPD forces on September 3. Joe graduated from the University of St. Thomas School of Law in May 2012. He moved to Montana from Chicago with his wife and one year old son.

Also new to the Miles City office is Administrative Assistant Trisha Henry. Trisha came from Oregon to be with her husband in August, 2012. The couple have 5 children between them ranging in age from 24 to 13. Welcome Joe and Trisha!



Trisha Henry



Joseph Zavatsky, (far left)

CHIEF'S CORNER^{CONTINUED FROM PG 1}

In the criminal defense world, “success” has several meanings. We have a number of tangible success stories to pass on. In Region 3, Nichole Lovrich had a not guilty verdict in a DUI bench trial, and Mark Frisbie got the same verdict in a PFMA bench trial. Larry LaFountain got a hung jury on charges of burglary and criminal mischief and an acquittal on a third charge, and Vince van der Hagen got a hung jury on a felony sexual assault. In Missoula, Scott Spencer won a not guilty verdict following a difficult trial on a charge of sexual intercourse without consent. Well done, all of you!

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Please join me in welcoming Tom Schoenleben as the new Region 6 Deputy Public Defender. Tom has served as staff attorney in the Havre office, and I asked him to take over for Dan Minnis, who is leaving us and moving on to the greener pastures of retirement. Dan has served his clients and the agency with dedication and distinction, and he will be missed.

*We would do well to remember
that we are all in this together.*

DON'T LEAVE YOUR BENNIES ON THE TABLE— ANNUAL CHANGE IS HERE!



There are many exciting changes to our healthcare benefits this year. Here are some highlights:

- Limited open enrollment for dependent children under age 26 with no qualifying event
 - The health screening/tobacco free discounts increase to \$10 each, or a maximum of \$40 per family (Note: this is a multi-step process all of which must be complete by 12/31/13 to qualify for the discounts in 2014)
 - State share increases by \$73 while premiums are increasing a maximum of 5%--less out of pocket expense for you, and possibly some left over for your flex plan
- New flexible spending choices include a debit card or joint processing (no need to submit healthcare flex reimbursement requests) with no annual fee
 - Increased dental benefit
 - New vision benefit—annual eye exam for all CIGNA members with an optional hardware plan including a larger provider network

Be sure to elect your benefits by mid-October, and attend a local presentation or webinar to learn more <http://benefits.mt.gov/pages/1.files/presentation.schedule.employees.pdf>.

REMEMBER: NEW LAWS EFFECTIVE OCTOBER 1

Several new laws take effective October 1. They include:

- Establishing a numerical limit for impairment by THC, the active ingredient in marijuana, to determine whether a driver is impaired by marijuana use.
- Requiring out-of-state sex offenders who move to Montana to provide a DNA sample to law enforcement.
- Allowing state judges to assign a “tier level” to sex offenders who don’t have one. An offender’s tier level determines how often they must check in with local authorities.
- Criminalization the possession of synthetic drugs that mimic already illegal drugs, to prevent the manufacture of so-called “designer drugs.”
- Increasing the maximum penalty to 20 years for someone convicted of assaulting a child 36 months old or younger.
- Requiring the state Department of Public Health and Human Services to report to law enforcement all instances of child abuse.
- Imposing stiffer consumer-protection penalties for scammers who target the elderly or the mentally ill.

For more information, contact Eric Olson, Training Coordinator.

ARE YOU ROLLING THE DICE?

You might be endangering yourself, passengers, other drivers and bystanders if you are distracted while you drive. Any activity that diverts a person's attention away from the primary task of driving is distracted driving.

How dangerous are these types of distractions?

- ◆ Reaching for a moving object—9 times more likely to crash
- ◆ Drowsy driving—4-6 times more likely to crash
- ◆ Looking at an external object—4 times more likely to crash
- ◆ Texting on a cell phone—3 times more likely to crash
- ◆ Using a cell phone or smartphone, **including hands-free**—one and a half times more likely to crash

Some other distracting behaviors:

- ◆ Eating and drinking
- ◆ Talking to passengers
- ◆ Using a navigation system
- ◆ Adjusting a radio, CD player, or MP3 player

While hands-free technologies might seem safer, there are dangerous mental distractions even when drivers keep their hands on the wheel and their eyes on the road.

The best course is to reduce distractions by planning ahead (setting vehicle controls, stopping to eat, making sure you are well-rested), letting your phone take messages while you are driving and letting your passenger handle the radio.

However, you can reduce the risk of a crash by following at least 3 seconds behind the vehicle in front of you in ideal conditions. Add a second or more for every hazard due to weather, road conditions, or driver condition. This gives more time to perceive hazards and avoid a crash.

The Risk Management and Tort Defense Division periodically offers courses throughout the state on winter driving skills and reducing distracted driving. Watch for announcements for a class near you, or check their [schedule](#) online.

CONGRATULATIONS BEKKI!

Congratulations to Bekki Downing from Central Services for receiving the 2013 Department of Administration's Award for Excellence in Performance. Bekki was nominated for the award because she was instrumental in setting up the SABHRS Accounts Receivable Module for OPD, enabling us to track public defender fee assess-

ments and payments by case as required by statute. This was a long, arduous process that required countless hours of testing and Bekki was very dedicated to seeing this project through. Our use of the resulting data to complete the FY 13 fiscal year end accounting entries ensured data integrity in our required reporting.



Pictured from left: Bill Hooks, Bekki Downing, Carleen Green, and DOA Director Sheila Hogan

DO YOU HAVE INFORMATION ROT?

The life cycle of information can be compared to that of a bunch of daisies--valuable in the beginning, but eventually reduced to a smelly mess that needs to be thrown out. Huge volumes of new information arrive constantly and pile up on the already existing data until you are overrun by records. If the challenge of dealing with your information ROT--redundant, outdated, and trivial--seems insurmountable, here are some rules that will help control your digital debris.

- **Rule 1:** Stop keeping everything forever
- **Rule 2:** Clean up the past to gain efficiency
- **Rule 3:** Keep only what you can access and be sure you can access what you keep
- **Rule 4:** Strive for reasonableness, not perfection
- **Rule 5:** Destroy records that have reached the end of their retention period (yes, all of them!)

For more information or assistance in determining what you can dispose of, contact your agency records coordinator or Cathy Doyle in Central Services.



State v. Brothers, 2013 MT 222, ¶ 4. On January 10, 2011 Brothers was arrested in New Mexico. *Brothers*, ¶ 4. Later, Brothers was extradited to Montana. Brothers reached a plea agreement. *Brothers*, ¶ 4. At sentencing, the State requested Brothers pay \$1,069.02 in restitution for the costs of extradition. *Brothers*, ¶ 5. The State offered no affidavit or testimony establishing the amount of restitution. *Brothers*, ¶ 5. Defense counsel objected that this restitution was just “brought up.” *Brothers*, ¶ 5. The Supreme Court agreed that restitution cannot be awarded without either sworn testimony or an affidavit establishing its existence. The Court further held that pursuant to *State v. Jay*, 2013 MT 79 and Mont. Code Ann. § 46-18-243(2)(a), the State is a victim “only when that entity suffers property damage in the commission of a crime, or incurs costs in the investigation or apprehension of an escaped person.” Here, the State’s expenses were not the result of property damage or the result of the investigation or apprehension of an escapee. *Brothers*, ¶ 13. Therefore, the District Court lacked authority to order restitution be paid to the State. *Brothers*, ¶ 14.

The State is not permitted to question the defendant about his prior criminal history. *State v. Rogers*, 2013 MT 221.

Following a three day trial, a Missoula County jury convicted Rogers of eight criminal counts, including sexual intercourse without consent, partner or family member assault, unlawful restraint, and violation of a no contract order. *State v. Rogers*, 2013 MT 221, ¶ 1. At trial, Rogers testified. *Rogers*, ¶ 19. On cross examination, the prosecutor -- Jason Marks -- asked “when you said you have kind of a checkered past, that didn’t quite cover the whole story did it?” *Rogers*, ¶ 20. Rogers answered, “Do you want to prosecute me on my past or this charge.” *Rogers*, ¶ 20. Marks then asked, “You’ve got two partner or family member assaults you were convicted of?” *Rogers*, ¶ 20. Rogers indicated that was true. *Rogers*, ¶ 20. Marks proceeded and asked, “I’m assuming those [bar fights] are the misdemeanor assaults on your record?” *Rogers*, ¶ 20. Continuing, Marks asked Rogers, “And how many women is it you’ve been charged with raping?” *Rogers*, ¶ 21. Rogers answered, “Oh, five, ten, twenty – I don’t know. You tell me – actually, two – years ago. Fifteen years ago, I was accused of it. I was acquitted of it, and charges were dismissed, and [S.M.’s] . . .” At that point, Marks interrupted and stated, “You were convicted at trial, and it went up [and was reversed] on appeal. Lets be clear.” *Rogers*, ¶ 21. Rogers argued the District Court “erred and prejudiced [him] by allowing the State to inquire into his past criminal history, including matters that were reversed on appeal.” *Rogers*, ¶ 30. Rogers argued the State’s questioning violated Rule 404(b). *Rogers*, ¶ 30. The Court held that neither the District Court nor the State offered any basis for admissibility of Roger’s entire violent criminal history. *Rogers*, ¶ 35. The Court further held the District Court’s error was prejudicial to Rogers. *Rogers*, ¶ 45. As a result, the Court reversed Rogers’ convictions and remanded for a new trial. *Rogers*, ¶ 46.



**Investigator of the Year
Cathy Huston**

Cathy was honored for her tireless work at the 2013 Legislature advocating for legislation to allow OPD investigators to carry firearms on the job, as well as her excellent case work in the past year.

Congratulations, Cathy!

HR POLICY CORNER

Have you seen the new MOM (Montana Operations Manual) website? All state policies are available at <https://montana.policytech.com/default.aspx?public=true&siteid=1>. They are organized by subject matter, but you can also search by keyword. In addition, OPD's agency-specific policies are at <http://publicdefender.mt.gov/policies.asp>.

Annual Leave: State employees earn annual leave credits from the first day of employment, but are not entitled to any vacation leave with pay until they have been continuously employed for a period of six calendar months. Annual leave may be accumulated to a total not to exceed two times the maximum number of days earned annually as of the end of the first pay period of the calendar year.

Sick Leave: State employees are eligible to earn sick leave credits from the first day of employment, but the credits may not be used until you have been continuously employed for 90 days. There is no limit on the number of sick leave credits that can be accumulated.

Sick leave can be used for an employee or for care of a family member due to physical or mental illness, injury or disability; maternity-related disability or parental leave; or other approved uses. See the Sick Leave policy on the MOM site for more details.



CALLING ALL CARS! TRAVEL REMINDERS . . .

Always use the travel voucher form located on the OPD Intranet site as this will ensure that the most current and correct form is being used and all correct rates for reimbursement are present. Please do not save the form to your computer, and if you have any old travel vouchers saved or printed, destroy them and use the current form. If you have trouble locating the form feel free to contact Jessie Reehl (406-496-6091) she is happy to help!

If you are requesting reimbursement for personal vehicle mileage, your travel expense voucher must be accompanied by documentation from your regional fleet manager stating the unavailability of a state vehicle for your use on the dates corresponding to your travel voucher.

If you are traveling for work related to another region you must also obtain the authorization of the regional deputy public defender from the region for which you are doing the work (example: you work in region 3 and have agreed to take a case from region 6, any travel related to the case must also be approved by the region 6 RDPD).

If you have multiple travel events or expenses you may submit all costs on the same travel voucher (but you must submit your travel voucher within 90 days of the initial expenditure).

If you are planning to travel out of state for any authorized training or OPD related function you must first obtain approval! Out of state travel request forms can be found on the OPD intranet site and must be signed by both your immediate supervisor and the department head prior to travel.

All state travel policies are available for your review at <https://montana.policytech.com/default.aspx?public=true&siteid=1>.

If you are expecting to travel soon it may be a good idea to review these policies and procedures.

